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STATE OF ARIZONA  
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5 IN THE SUPERIOR COURT OF THE STATE OF ARIZONA  
6  
7 IN AND FOR THE COUNTY OF COCHISE

8 STATE OF ARIZONA ) Case No. CR201700516  
9 Plaintiff, ) Hon. James L. Conlogue  
10 vs. ) DIVISION V  
11 ROGER DELANE WILSON, )  
12 Defendant. )  
13 \_\_\_\_\_ )  
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The State of Arizona, through the Cochise County Attorney, Brian M. McIntyre, and Lori A. Zucco, his Chief Criminal Deputy, hereby responds to Defendant's Motion for Change of Venue with the following Memorandum of Points and Authorities.

18 MEMORANDUM OF POINTS AND AUTHORITIES

19 **FACTS:**

20 Defendant cites to numerous articles that have been published about this case but  
21 does not attach any of them to his motion or include any data regarding distribution, reader  
22 numbers, followers, population, etc. Defendant has the burden of proving that the  
23 dissemination of the alleged prejudicial material probably will result in Defendant being  
24 deprived of a fair trial. This is difficult to ascertain without the content of the articles  
25 being part of the record, as well as other relevant data.

26 The State would request the hyperlinks to the articles and leave to supplement this  
27 response. The State would also request leave to supplement the record after the testimony  
28 of Dr. Gorgueiro at the evidentiary hearing set next month.

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2 **LAW AND ARGUMENT:**  
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4 **1. THE PRE-TRIAL PUBLICITY IS NOT SO OUTRAGEOUS SO AS TO  
GIVE RISE TO A PRESUMPTION OF PREJUDICE**

5 First, Defendant argues that outrageous, unfair, prejudicial, and pervasive pretrial  
6 publicity dictates that prejudice requiring a change of venue should be presumed—  
7 making a showing of actual prejudice unnecessary. Juror exposure to information about  
8 an offense charged ordinarily does not raise a presumption that a defendant was denied a  
9 fair trial. *State v. Bible*, 175 Ariz. 549, 563 (1993), citing *Murphy v. Florida*, 421 U.S.  
10 794, 799, 95 S.Ct. 2031, 2036, 44 L.Ed.2d 589 (1975). If, however, a defendant can show  
11 pretrial publicity so outrageous that it promises to turn the trial into a mockery of justice  
12 or a mere formality, prejudice will be presumed without examining the publicity's actual  
13 influence on the jury. *Bible* at 563 (citations omitted).

14 The burden to show that pretrial publicity is presumptively prejudicial clearly rests  
15 with the defendant and is “extremely heavy.” *Bible* at 564, citing *Coleman v. Kemp*, 778  
16 F.2d 1487, 1537 (11th Cir.1985), cert. denied, 476 U.S. 1164, 106 S.Ct. 2289, 90 L.Ed.2d  
17 730 (1986). In varying procedural contexts, appellate courts have found that the issue of  
18 presumed prejudice is a question of fact or a mixed question of law and fact resulting in  
19 standards of review including “manifest error,” “clearly erroneous,” and others. *Bible* at  
20 564 (citations omitted). Due in large part to the findings required, courts rarely presume  
21 prejudice due to outrageous pretrial publicity. *Id.* The *Bible* Court, in finding that the  
22 pre-trial publicity in that case did not give rise to a presumption of prejudice, went on to  
23 state:

24 To presume prejudice, we must necessarily disregard the results of voir dire  
25 examination as well as the circumstances surrounding pretrial proceedings  
26 and reach our own conclusion based on the totality of the circumstances  
27 from the entire record. *See Pamplin v. Mason*, 364 F.2d 1, 6 (5th Cir.1966).  
We must also find that the defendant has shown “inflammatory and  
prejudicial pretrial publicity that so pervaded the community as to render  
virtually impossible a fair trial before an impartial jury.” *Coleman*, 778 F.2d

at 1540. In short, to presume prejudice, we must necessarily decide that the publicity was so unfair, so prejudicial, and so pervasive that we cannot give any credibility to the jurors' answers during voir dire affirming their ability to decide the case fairly.

*Bible* at 565.

When one compares the pre-trial publicity in this case to that found in the *Bible* case and the cases cited within that opinion, the publicity in this case is not outrageous.

Much of the reporting in this case has been favorable to Defendant, especially the reporting/blogging of David Morgan and his successful challenge to the County Attorney's request for Preliminary Injunction. The actual reporting by legitimate news outlets has been fact-based and not outrageous or prejudicial at all.

The *Bible* Court looked at when pre-trial publicity has traditionally been found to be at a level where prejudice would be presumed:

"The circumstances in this case fall short of those rare and unusual cases where this difficult showing has been made. See, e.g., [*Rideau v. Louisiana*, 373 U.S. 723, 726-727 (1963)] (televised "confession" seen by many potential jurors); *Coleman*, 778 F.2d at 1538-1543 (overwhelming publicity in county with population of 7000); *Isaacs v. Kemp*, 778 F.2d 1482, 1483-84 (11th Cir.1985) (companion case to *Coleman* ); *United States v. Denno*, 313 F.2d 364, 366-67, 372 (2d Cir.) (en banc) (6-3 decision) (extensive pretrial publicity including defendant's confession; "[t]hc publicity was in its nature highly inflammatory, in volume great, and accessibility universal."), cert. denied, 372 U.S. 978, 83 S.Ct. 1112, 10 L.Ed.2d 143 (1963); cf. *Sheppard v. Maxwell*, 384 U.S. 333, 86 S.Ct. 1507, 16 L.Ed.2d 600 (1966) (overwhelming pretrial publicity, coupled with publicity at trial and outrageous trial conduct, required reversal). These cases show more in the way of inaccurate as well as extremely prejudicial pretrial publicity than does the totality of the record in this case. These cases also demonstrate the media's successful and sometimes relentless attempt to whip up hysteria and passion in the community—something the present case lacks. And at least *Sheppard* contains something else lacking in this case—the media successfully influencing law enforcement officers and court personnel as well as the court itself. See *Sheppard*, 384 U.S. at 337, 354-58, 362, 86 S.Ct. at 1518-20, 1522.

Nor is the substance of the pretrial publicity in the present case comparable to that in *Rideau*, where a local television station thrice showed the defendant's confession.

"In *Rideau* the defendant had 'confessed' under police interrogation to the murder of which he stood convicted. A 20-minute film of his confession was broadcast three times by a television station in the community where the crime and the trial took place. In reversing, the Court did not examine the voir dire for evidence of actual prejudice because it considered the trial under review 'but a hollow formality'—the real trial had occurred when tens of thousands of people, in a community of 150,000, had seen and heard the defendant admit his guilt before the cameras."

*State v. Atwood*, 171 Ariz. 576, 631, (quoting *Murphy*, 421 U.S. at 799, 95 S.Ct. at 2035–36); see also *Coleman*, 778 F.2d at 1491–1537."

*Bible* at 565.

The *Bible* Court went on to conclude:

On this record, we cannot conclude that the trial was "utterly corrupted" by pretrial publicity, *Murphy*, 421 U.S. at 798, 95 S.Ct. at 2035, and therefore will not presume prejudice, see *Atwood*, 171 Ariz. at 631, 832 P.2d at 648; *State v. LaGrand*, 153 Ariz. 21, 34, 734 P.2d 563, 576, cert. denied, 484 U.S. 872, 108 S.Ct. 207, 98 L.Ed.2d 158 (1987); *State v. Greenawalt*, 128 Ariz. 150, 164, 624 P.2d 828, 842, cert. denied, 454 U.S. 882, 102 S.Ct. 364, 70 L.Ed.2d 191 (1981).<sup>6</sup> Accordingly, we turn to the issue of whether the record demonstrates actual prejudice.

*Bible* at 565.

The pre-trial publicity in this case falls short of the standards set by the Court in *Bible*, so prejudice should not be presumed. We should now turn the question of actual prejudice.

## 2. THE PRE-TRIAL PUBLICITY HAS NOT BEEN SHOWN TO HAVE ACTUALLY PREJUDICED DEFENDANT.

Defendant next claims actual prejudice based on an oral argument made by a Deputy County Attorney at the hearing on a preliminary injunction of a Facebook post. Arguments of counsel are not evidence and although Mr. Morgan's publication of the

1 grand jury transcript has the potential to taint the jury pool, as acknowledged by the  
2 Deputy County Attorney who litigated that issue, it remains to be seen if the publication  
3 actually prejudiced Defendant. Perhaps a pre-trial juror questionnaire, mailed out weeks  
4 before a scheduled trial date, would be one way to determine if actual prejudice has  
5 occurred in this case.

6 **CONLCUSION:**

7 Wherefore, because the pre-trial publicity in this case is not outrageous in  
8 comparison to the pre-trial publicity in *Bible* and the cases cited therein, and because  
9 Defendant has not demonstrated actual prejudice, the State requests that Defendant's  
Motion for Change of Venue be **DENIED**.

10 RESPECTFULLY SUBMITTED this 16<sup>th</sup> day of June 2019.

11 COCHISE COUNTY ATTORNEY

12 By: 

13  
14 LORI ANN ZUCCO  
Deputy County Attorney

15 Copy of the foregoing  
16 mailed/delivered/faxed  
17 this 16<sup>th</sup> day of June 2019 to:

18 The Honorable James L. Conlogue  
19 Judge of the Superior Court  
Division V  
Bisbee, Arizona 85603

20 Steven D. West, Esq.  
21 Attorney for the Defendant

